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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MANUEL JARAMILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

GEORGE MCCALL SECREST, JR.
State Bar No. 17973900
333 Clay Street, Suite 4130
Houston, Texas 77002
(713) 757-0679

Attorney for Petitioner,
MANUEL JARAMILLO

Alpha Law Brief Co. • 6113 Aletha Lane • Houston, Texas 77081 • (713) 981-9000

QUESTION PRESENTED

Whether the Court of Appeals erred in concluding that the prosecution proved beyond a reasonable doubt the petitioner's complicity in the cocaine conspiracy alleged, where the evidence is insufficient, as a matter of law, to establish the complicity of the only named co-defendant not acquitted by the jury and the evidence is equally insufficient in establishing the existence of "other persons unknown to the grand jurors"?

LIST OF PARTIES

The United States of America.

Manuel Jaramillo.

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Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit be entered in the above entitled proceeding.

OPINION BELOW

A copy of the opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 90-2716, *United States v. Manuel Jaramillo,* (unpublished), is attached as Appendix A. Pursuant to Local Rule 47.5.1 of the Fifth Circuit, the opinion was not published.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit on October 16, 1991, entered its opinion affirming the judgment of the District Court. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

No person . . . shall be deprived of his right to life, liberty, or property, without due process of law.

STATUTES INVOLVED

21 U.S.C. § 841 (1988).

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to . . . possess with intent to . . . distribute, a controlled substance;

21 U.S.C. § 846 (1988).

Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Manuel Jaramillo, the petitioner, was convicted in Criminal No. M-89-517-S2[1] of a conspiracy to possess with the intent to distribute in excess of five (5) kilograms of cocaine and in Criminal No. M-89-390-S1[2] of a conspiracy to possess with the intent to distribute more than fifty (50) kilograms, but less than one-hundred (100) kilograms of marijuana, and of possessing with the intent to distribute a like amount of marijuana, proscribed respectively by 21 U.S.C. § 846 (1988), 21 U.S.C. § 841(a)(1) (1988), 21 U.S.C. § 841(b)(1)(C) (1988), 18 U.S.C. § 2 (1969). On motion of the government, the pleadings were consolidated for trial. Jose Luis Sepulveda absconded and did not stand trial. Rodolfo Pena was acquitted by the jury on all charges.

The petitioner was sentenced on August 7, 1990, to a twenty-five (25) year term in the custody of the Attorney General as to the cocaine conspiracy charge

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1. (M-89-517-S2)—"from on or about April 1, 1987, to on or about July 23, 1987, within the Southern District of Texas, and elsewhere within the jurisdiction of this Court, Defendants Manuel Jaramillo, Jose Luis Sepulveda, and Rodolfo Pena did knowingly and intentionally conspire and agree together with other persons unknown to the Grand Jurors to knowingly and intentionally possess with intent to distribute a quantity of cocaine in an amount in excess of 5 kilograms, a Schedule II controlled substance."

2. (M-89-390-S1)—"from on or apout April 1, 1987, to on or about July 23, 1987, in the Southern District of Texas and within the jurisdiction of the Court, Defendants Manuel Jaramillo, Jose Luis Sepulveda, Rodolfo Pena, and Fernando LNU did knowingly and intentionally conspire and agree together with other persons known and unknown to the Grand Jurors to knowingly and intentionally possess with intent to distribute more than 50 kilograms but less than 100 kilograms of marijuana, a Schedule I controlled substance."

and was assessed ten (10) years as to the possession with the intent to distribute marijuana allegation, as well as the marijuana conspiracy count. All punishments were ordered to run concurrently. In addition, as to the substantive marijuana conviction, a four (4) year term of supervised release was assessed.

The government's star witness was Pablo Conde. As the evidence reveals, he was a former police officer having been dismissed by the McAllen Police Department. Of late, Mr. Conde had been "working" cases for the DEA. He had garnered over $8,000 from that agency for services rendered up to the date of trial and had applied for a "reward" of $93,000 relative to his assistance in the instant investigation.

Conde testified that he was introduced to Jaramillo by Jose Luis Sepulveda as someone who had connections to get drugs around Border Patrol checkpoints. The first meeting supposedly took place on May 21, 1987 at Irene's Bar in Mission, Texas. Jaramillo, according to Conde, wanted to transport 2,000 pounds of marijuana every ten (10) days and an accord was reached for a $60-$65 per pound price to be paid for Conde's checkpoint service.

Conde related that Jaramillo had 120 pounds of marijuana that he was willing to "try" with the witness. Two hundred dollars ($200) spending money was given to Conde by Jaramillo and Jaramillo allegedly asserted that within six (6) months, he would make Conde a millionaire if the trial run was successful. The record also shows that Jaramillo was interested in making a "dry" run and wanted to go along with Conde to see how his system worked, but this request was refused.

Several days later, on May 26, 1987, Sepulveda took Conde to an apartment on North 23rd Street in McAllen and met Jaramillo and co-defendant Rodolfo Pena. Conde was given instructions that after this meeting Sepulveda would no longer be the contact or go-between; future messages would be received from and left with Pena who would get in touch with Jaramillo. Conde was given a telephone number to call and was instructed to ask for "Rudy Pena". Jaramillo instructed conde to be at Sepulveda's house on the following day at 8:00 p.m. to take possession of the alleged 120 pounds of marijuana.

At approximately 10:00 p.m. on May 27, 1987, Jaramillo arrived at Sepulveda's house in Mission, Texas with three (3) boxes, placed them in Conde's pickup truck and told him to contact "Charley Howell" in Corpus Christi where the marijuana was supposed to be delivered. Jaramillo, according to Conde, represented that the boxes contained 120 pounds of marijuana and cautioned him not to tamper with or open the boxes. Conde refused to deliver the boxes to a stranger by the name of Howell and arrangements were made for Jaramillo to rendezvous with Conde in Corpus Christi.

On the following morning, Jaramillo and Sepulveda met Conde in Corpus Christi and introduced him to a person named Charley Howell. After breakfast, Howell, Jaramillo, Sepulveda, Conde, and another individual who was with Howell drove to a warehouse where Conde had prearranged with DEA agents to store the three (3) boxes. Howell took possession of the three (3) boxes at that location.

Conde testified that Jaramillo was pleased with his services; paid him "$7,200 or $7,400" and stated that

he had 1,000 pounds for immediate pickup and delivery. Conde told Jaramillo that he would need to check with his (Conde's) people to see if it could be arranged. In actuality, Conde was buying time to contact his control agent. Rather interestingly, it was developed on cross-examination that Conde did not report receipt of the money to agent Bryant of the DEA or the Internal Revenue Service.

As the indictments averred[3] and the record clearly reflects, *at least two (2) separate conspiracies were testified to by government witnesses in the case at bar.* On July 4, 1987, Conde had a conversation with Jaramillo relative to transporting cocaine for $1,000 per kilogram. The July 4, 1987, meeting *between Jaramillo and Conde is the first occasion that cocaine was mentioned.* In any event, Conde contacted Agent Bryant who told him to tell Jaramillo that cocaine could be transported through the check point, but only in increments of at least fifteen (15) kilograms. Conde also related that at the July 4, 1987, meeting he told Jaramillo that he "could get him some cocaine if he was looking for some". Conde and Jaramillo supposedly talked and agreed on a price of $10,300 per kilogram.

Evidence which arguably addresses the possible involvement of non-government agents in the alleged cocaine conspiracy was adduced at this juncture of Conde's testimony:

Q: (Prosecutor) Now do you know who paid—let me ask you this: were Rudy Pena or Jose Luis Sepulveda, were they supposed to get anything out of this?

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3 See Footnotes 1 and 2.

A: That was brought up by Mr. Pena and Mr. Sepulveda *at one time,* that I was to cut them in on any money that Jaramillo paid me.

Q: And who told you, who brought that up?

A: Rudy Pena and Jose Luis Sepulveda.

Q: And what did you tell them?

A: I avoided the question, and brought it up in the presence of Mr. Jaramillo at a later date.

Q: And what did you say?

A: I asked Mr. Jaramillo if I was supposed to pay Mr. Pena and Mr. Sepulveda out of what he paid me, or was he going to pay them.

Q: And what did Manuel say?

A: He said that he would take care of them, that I wouldn't have to pay them anything.
(The Court:)
And was (sic) in regards to the cocaine transaction or what?
(The witness:)
This was in regards to any transactions that went on.
(The Court:)
Go ahead.

Q: To your knowledge in front of you was Jose Luis Sepulveda or Rudy Pena ever paid by Manuel Jaramillo?

A: Never.

Q: Did you ever have conversations with Rudy Pena about monetary compensation that Manuel gave to him?

A: One point Mr. Jaramillo had instructed Mr. Pena to contact me for a meeting, Mr. Jaramillo did not show up.
(Mr. Lindenmuth [counsel for Pena]:)
I would just ask the court to be more specific as to time and dates, Your Honor.

(The Court:)
Can you give yourself a time, as far as a date more or less?
(The witness:)
It was approximately the middle of May of 1987, to middle of July, 1987.
(The Court:)
How many meetings did you have, do you remember having at Rudy Pena's apartment?
(The witness:)
10, 15, or 20 meetings.
(The Court:)
Mr. Pena was never present though, when you discussed any cocaine transactions with Mr. Jaramillo, is that your testimony?
(The witness:)
No, sir, Mr. Pena was always present at every meeting.
(The Court:)
And he heard all these conversations about what you were saying was the price agreement on the cocaine and everything else?
(The witness:)
Yes sir.
(The Court:)
And the conversation that you had with Mr. Pena about being cut into the money was before or after there had been any discussions on cocaine?
(The witness:)
Before.
(The Court:)
Go ahead.

Q: Now did Rudy Pena ever make any representations to you that Manuel was going to pay for or do anything else for it?

A: In one of those meetings that Mr. Jaramillo did not show up, Mr. Pena stated that he wished Mr. Jaramillo had shown up because he owed him for the phone bill at his apartment, because Mr. Jaramillo had been making a lot of calls from his phone.

(The Court:)
And that meeting was around when?
(The witness:)
That meeting, if I remember correctly, was just prior to, prior to July the 4th.
(The Court:)
So that was before you had any cocaine discussion with Mr. Jaramillo, is that right?
(The witness:)
Yes sir.
(The Court:)
Go ahead.
(Vol. 2 - 91-93) (emphasis added)

Conde testified that he told Jaramillo that he could get forty (40) kilos of cocaine from Mexico; this transaction, however, was never consummated. On July 22, 1987, Conde told Jaramillo about 150 kilos of cocaine supposedly available in Brownsville, Texas. On July 23, 1987, Agent Bryant was introduced to Jaramillo as being the person who had the aforementioned cocaine for sale. At the meeting, Jaramillo was told by Bryant that his people (Bryant's) did not think that Jaramillo could buy 150 kilos of cocaine. Jaramillo and Bryant departed the grocery store parking lot where their initial meeting was arranged by Conde and traveled to Jaramillo's home where some $350,000 in cash was shown to the agent. Shortly after being shown the money, Bryant signaled other officers who were conducting surveillance to arrest Jaramillo. Bryant testified that he *never* had any contact with Sepulveda; everything as to what Sepulveda supposedly said came from Conde. Conde related that he had a telephone conversation with Sepulveda after Jaramillo was arrested and that Sepulveda wanted Conde to help him leave town.

While the government offered extensive testimony regarding the surveillance of Conde, Sepulveda, Pena, Bryant, and Jaramillo, and introduced telephone records showing that telephone calls had been placed between the residences of *San Juanita* Sepulveda,[4] Pena, and Jaramillo, insufficient evidence was offered which demonstrated both Sepulveda's *intent to participate and active participation* in the cocaine conspiracy alleged. Nor was any evidence adduced by the government which would prove beyond a reasonable doubt that "other persons unknown to the grand jury" participated in the cocaine conspiracy.

The Court of Appeals held that the evidence was sufficient in establishing that the petitioner conspired with Sepulveda. It reasoned that

> "the jury could have concluded that Sepulveda, who fled after Jaramillo's arrest, was the defendant's co-conspirator. Sepulveda was present at many of the meetings with Jaramillo that Conde attended; he even introduced the informant to Jaramillo. He participated in Jaramillo's marijuana plot, and obviously knew of the cocaine plot, because he asked Conde to call him when the cocaine had been delivered. Additionally, Conde testified that Jaramillo was to provide Sepulveda with a cut of the profits from all of the drug transactions that they conducted." (Appendix p. 6a).

As will be shown *infra,* while the prosecution established both Sepulveda's complicity in the marijuana conspiracy and his association with the petitioner, it failed to prove that Sepulveda intended to participate and, in fact, did participate in the *cocaine* conspiracy. Conde's testimony simply did not support the inferences drawn

4. The prosecution conceded during its opening statement that Jose Luis Sepulva did not have a telephone (Vol. 1 - 34).

therefrom by the Court of Appeals. Due to the government's pleading which alleged the existence of *two* (2) separate conspiracies, embodying different alleged members, and having as their object the possession with the intent to distribute *different* drugs, the government did not prove beyond a reasonable doubt Sepulveda's complicity and agreement to conspire to possess with the intent to distribute cocaine.

Additionally, the Court of Appeals held that the government's proof was sufficient in establishing that the petitioner "conspired with unidentified people in Chicago. Conde testified that in his discussions with Jaramillo to plan the cocaine smuggling, the (petitioner) stated 'he needed to get narcotics to Chicago because that's the way his people made a living.' " (Appendix p. 6a) The Court of Appeals was of the view that "[s]uch testimony could well indicate that Jaramillo and 'his people' had an existing business relationship and a shared intent to distribute the cocaine." (Appendix p. 6a)

The Court of Appeals pointed to testimony that the petitioner's housekeeper

> "acknowledged that Jaramillo travelled to Chicago on a number of occasions, ostensibly to visit a doctor but always in possession of a briefcase that a government agent *later* found to contain $350,000." (Appendix p. 6a) (emphasis added)

Evidently, concluding that because the briefcase contained $350,000 when seized, and, therefore, must have likewise contained money on some previous, unidentified sojourn to Chicago, the Court of Appeals held that "[t]he jury thus could conclude that Jaramillo conspired with 'his people' in Chicago to obtain and distribute cocaine." (Appendix p. 6a)

REASON FOR GRANTING THE WRIT

The Fifth Circuit's holding that the evidence was sufficient to support the petitioner's conviction of a conspiracy to possess with the intent to distribute cocaine cannot be squared with the decisions of this Court and other circuits.

It was strictly incumbent upon the prosecution in order to prove the cocaine conspiracy count "to show beyond a reasonable doubt that two or more *non-governmental* persons agreed to commit the alleged offense." *United States v. Goff*, 847 F.2d 149, 173 (5th Cir. 1988). More specifically,

> "[t]he government had to establish beyond a reasonable doubt that (1) an agreement existed between at least two *non-government people* . . . to possess cocaine with the intent to distribute, and that (2) the charged individuals (a) knew of the conspiracy, (b) *intended to participate in the conspiracy*, and (c) *did participate in the conspiracy*." *United States v. Toro*, 840 F.2d 1221, 1232 (5th Cir. 1988). (emphasis added)

A government agent or government informant cannot, as a matter of law, be a conspirator. *United States v. Goff*, supra; *United States v. Escobar De Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984). It is axiomatic therefore that the petitioner could not have conspired to possess with the intent to distribute cocaine with agent Bryant or Pablo Conde. This much the Court of Appeals agreed with. (Appendix p. 5a)

Furthermore, the acquittal of Adolfo Pena by the jury in the case at bar stymied the government's proof vis-a-vis the petitioner. "The . . . conviction of only one defendant in a conspiracy prosecution would not be upheld when

all the other alleged co-conspirators on trial are aquitted." *United States v. Sheikh,* 654 F.2d 1057, 1062 (5th Cir. 1981), *cert. denied,* 455 U.S. 991 (1982). "[W]here the basis of the conspiracy charge is that one person agreed with only one other person, it would not be justifiable to affirm the conviction of one where the jury found no agreement by the other." Marcus, *Prosecution and Defense of Criminal Conspiracy Cases,* § 2.03, pps. 18-19. *But see, United States v. Andrews,* 850 F.2d 1557 (11th Cir. 1988) (en banc), *cert. denied,* 488 U.S. 1032 (1989); *United States v. Valles-Valencia,* 811 F.2d 1232 (9th Cir. 1987), *modified,* 823 F.2d 381 (9th Cir. 1987). The only other evidentiary scenarios that could possibly support a cocaine conspiracy conviction in the case *sub judice* would be if the evidence was sufficient to establish beyond a reasonable doubt Jose Luis Sepulveda's complicity or that of "persons unknown to the grand jury" with the petitioner. As to each of these considerations the petitioner next turns.

(A) Evidence as to Sepulveda

The petitioner readily concedes that the evidence is sufficient—in fact overwhelming—in establishing Sepulveda's involvement as to the *marijuana* conspiracy. He was the conduit initially between Conde and the petitioner and evidently was present during some of the earlier meetings that the petitioner, Conde, and Pena, attended. The government failed, however, in establishing beyond a reasonable doubt that Sepulveda intended to participate in the *cocaine* conspiracy therein and, *in fact, did participate. United States v. Toro,* supra.

Sepulveda never spoke with Bryant or any government witness, except Conde. Moreover, Sepulveda was not shown to be present during the July 4, 1987, meeting

between the petitioner and Conde when the subject of cocaine was first broached. Nor was Sepulveda present on July 23, 1987, when Bryant met the petitioner and supposedly discussed cocaine with him at that time. This first meeting between Bryant and the petitioner proved to be the last because the petitioner was arrested that very day by federal drug agents.

As mentioned, *supra*, the only testimony which arguably seems, at first blush, to address Sepulveda's possible complicity was a rambling colloquy of Conde adduced on direct examination. Conde testified that Pena and Sepulveda "at one time" brought up the subject of being "cut in" on money that the witness received from the petitioner. According to Conde, he later brought the subject up with the petitioner who stated "he would take care of them". It was not shown that Sepulveda was present during this alleged conversation between Conde and the petitioner. It was demonstrated, however, that the witness never observed any such payment being made.

While the record establishes that co-defendant Pena was present "at every meeting" where the subject of cocaine was discussed between the petitioner and Conde, *there was no evidence that Sepulveda was present at any such meeting.* Moreover, as Judge Hinojosa clarified in his questioning of Conde, the conversations regarding being "cut in" on the money took place *"before"* there had been any discussions as to cocaine. Contrary to the Court of Appeals' decision, it cannot be said with any degree of certainty, and most assuredly not beyond a reasonable doubt, that the comments purportedly made by Sepulveda regarding wanting to be "cut in" referred *specifically* to the *cocaine* transaction as opposed to the marijuana deal. There was no showing that any conver-

sations about being "cut in" took place *after* Conde and the petitioner discussed cocaine for the first time on July 4, 1987. In fact, due to Conde's testimony that the conversations about being "cut in" took place *prior* to any discussions between Conde and the petitioner regarding purchasing or transporting cocaine, a fair reading of the record leads ineluctably to the conclusion that these conversations with Sepulveda concerned only marijuana. Any other conclusion would be based upon pure conjecture and supposition.

Evidentiary Standard Relative to Conspiracy Prosecutions

In *Patterson v. New York,* 432 U.S. 197, 204-216 (1977), this Court held that the essential elements of a criminal conspiracy which must be proved beyond a reasonable doubt are knowledge, a specific intent to join the illegal association, and *actual participation* therein. Even the Fifth Circuit has recognized that,

> "[i]n a conspiracy prosecution under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt (1) the existence of an agreement between two or more persons to violate the narcotics law, and that (2) *each* conspirator knew of the conspiracy, (3) *intended to join it*, and (4) *did participate in the conspiracy* (citations omitted). *All four elements* must be found to uphold a conspiracy conviction. Thus, proof of 'mere knowing presence' is not sufficient to convict a person of participation in a conspiracy." *United States v. Espinoza-Seanez,* 862 F.2d 526, 536 (5th Cir. 1988), (emphasis added).

While an appellate court must "[g]ive deference to the findings of the jury" and review "the evidence presented in the case and the inferences that may be drawn

from it in a light most favorable to the government and ask whether 'a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt' (citation omitted) . . .", it

> "must not hesitate to overturn the jury verdict when it is necessary to 'guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt' *Estelle v. Williams,* 1976, 425 U.S. 501, 503, 96 S. Ct. 1691, 1693, 48 L.Ed.2d 126, 130. Juries must not be allowed to convict on mere suspicion and innuendo. *United States v. Littrell,* 574 F.2d 828, 833 (5th Cir. 1978). The test is whether the jury 'could reasonably, logically and legally infer from the evidence presented that the appellant was guilty beyond a reasonbale doubt.' *United States v. White,* 569 F.2d at 266." *United States v. Jackson,* 700 F.2d 181, 184-185 (5th Cir.), *cert. denied sub nom. Hicks v. United States,* 464 U.S. 842 (1983).

See also, In Re Winship, 397 U.S. 358, 361-365 (1970).

The factors articulated by the Court of Appeals which purportedly support the jury's verdict as to the cocaine conspiracy conviction, when closely scrutinized, are insufficient as a matter of law. In a nutshell, the Court of Appeals identified the following facts pertaining to Sepulveda which justified the conclusion that he was an *actual participant* in the cocaine conspiracy:

(1) Flight by Sepulveda after the petitioner's arrest;
(2) Sepulveda's presence at several meetings attended by the petitioner and Conde;
(3) Sepulveda's introduction of Conde to the petitioner;
(4) Sepulveda's participation in the petitioner's separate marijuana conspiracy;

(5) Sepulveda's knowledge of the existence of the cocaine conspiracy; and

(6) Conde's alleged testimony that the petitioner was to provide Sepulveda with a "cut of the profits from all the drug transactions that they conducted." (Appendix p. 6a)

Relative to Sepulveda's flight, it is axiomatic "that presence followed by flight is inadequate proof of *actual and knowing participation in a conspiracy*" *United States v. Sarro,* 742 F.2d 1286, 1299 (11th Cir. 1984) (emphasis added). Needless to say, Sepulveda's flight is equally consistent with the fact that he feared arrest for his involvement in the separate marijuana conspiracy.

Sepulveda's mere presence at several meetings attended by the petitioner, Conde, and others, and the fact that he initially introduced Conde to the petitioner is of little moment. No proof was adduced by the prosecution that Sepulveda was *ever* in attendance at *any* meeting where the subject of *cocaine* was discussed, as opposed to *marijuana.* And, even if he was present at such a meeting, mere presence, or for that matter, actual knowledge of a conspiracy's existence is not what is at issue in the case *sub judice.* The prosecution's case is flawed because no proof, certainly not proof beyond a reasonable doubt, was adduced establishing *both* Sepulveda's *intent to participate* and *actual participation* in the specific conspiracy alleged.

This very point was ably made by the Eleventh Circuit in *United States v. Sarro,* supra. The conspiracy conviction of defendant Tiedeberg was reversed even though the facts fairly established Tiedeberg's *knowledge* of the conspiracy. What was fatally lacking was proof that he

both intended to join the specific conspiracy alleged, as well as proof of actual participation therein.

As to the Fifth Circuit's observation that Sepulveda introduced Conde to the petitioner, it is clear that this introduction dealt with the *marijuana* plot and the petitioner's supposed desire to secure assistance in transporting marijuana through the checkpoints. Again, as the record reflects, the subject of cocaine was not broached by Conde with the petitioner when the two were introduced; it was much later in time when the subject of cocaine entered the picture.

The Fifth Circuit's reasoning that Sepulveda's complicity and culpability in the marijuana conspiracy can somehow support the government's proof of the separate and distinct cocaine conspiracy is particularly troubling. This Court has expressed concerns about "[t]he dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise . . ." *Kotteakos v. United States*, 328 U.S. 750, 774 (1946). In any event, the fact that Sepulveda was guilty of conspiring to possess with the intent to distribute marijuana is a distinctly separate inquiry, both factually and legally, from the one at hand: whether the government proved beyond a reasonable doubt that Sepulveda had an intent to participate and actually did participate in the cocaine conspiracy.

Finally, it is respectfully submitted that the Court of Appeals has misread, or at the very least, read too much into Conde's testimony concerning the petitioner's alleged statement that he (the petitioner) "was to provide Sepulveda with a cut of the profits from all of the drug transactions that they conducted." Again, not only was it not shown that Sepulveda, in fact, received any such cut,

the District Court's questioning of Conde clarified that the conversation regarding a "cut of the profits" took place during the course of the separate marijuana conspiracy and long before the subject of cocaine ever arose. (Vol. 2 - 91-93)

"[M]ere knowledge, approval, or acquiescence in an object of an alleged conspiracy (is not) sufficient to render an individual a part of a conspiracy. There must exist some element of affirmative cooperation or agreement to cooperate in the object of the conspiracy." *United States v. Moss,* 591 F.2d 428, 435 (8th Cir. 1979) The essential requisite of a "meeting of minds" between the petitioner and Sepulveda, relative to the *cocaine* conspiracy, simply was not established. *Krulewitch v. United States,* 336 U.S. 440, 448 (1949).

(B) Proof Based on the Existence of Unnamed Co-Conspirators

A prosecution can result in a conviction for conspiring with persons unknown to the grand jury "if the indictment charges a conspiracy with unknown persons and evidence supports their existence and the existence of the conspiracy." *United States v. Onick,* 889 F.2d 1425, 1432 (5th Cir. 1989). While the indictment averred that the petitioner conspired with persons unknown to the grand jury, in addition to the aforementioned named co-conspirators, the prosecution failed to adequately prove the unnamed co-conspirator's existence, let alone any conspiracy with these alleged phantoms.

The source or seller of the cocaine in the present case was the government—acting through its agents Bryant and Conde. The Court of Appeals seized upon testimony concerning a statement attributed to the petitioner and

made to Conde that "he (petitioner) needed to get narcotics to Chicago because that's the way his people made a living" to support the government's allegation that the petitioner conspired to possess with the intent to distribute cocaine "with other persons . . . unknown to the grand jurors". (Appendix p. 11a). The problem with this analysis is two fold. First, the admission, even if true, was not sufficiently corroborated to have any evidentiary basis. *Opper v. United States*, 348 U.S. 84 (1954). Merely because the petitioner had travelled to the city of Chicago in the past does not in any legally meaningful way corroboate Conde's assertion that the petitioner "needed to get narcotics to Chicago" for "his people" to make a living. No evidence was adduced by the prosecution that the petitioner had ever travelled to Chicago for nefarious reasons, much less that he had taken "drug money" to that location before. Such an assertion is based on conjecture—not admissible evidence. *See generally, United States v. Moss*, supra, at 435. *Compare, United States v. Carcaise*, 763 F.2d 1328 (11th Cir. 1985), wherein the prosecution offered taped conversations between the defendant therein and unknown persons regarding narcotic trafficking; and *United States v. Mosquera*, 779 F.2d 628 (11th Cir. 1986), wherein the evidence established the existence of radio communications by the ship captain defendant with unknown persons.

Secondly, and only for the sake of argument, if such an assertion is sufficient to establish the petitioner's complicity with "unknown persons", has the government proved beyond a reasonable doubt that the "unknown persons" included someone other than Rodolfo Pena, who was acquitted by the jury? To sustain the affirmance of the petitioner's conviction on such a tenuous evidentiary

basis is inconsistent with the command of this Court that "[i]n the administration of criminal justice, courts must carefully guard against the dilution of the principle that guilt is to be established by *probative* evidence and beyond a reasonable doubt." *Estelle v. Williams,* 425 U.S. 501, 503 (1976) (emphasis added)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE MCCALL SECREST, JR.
State Bar No. 17973900
333 Clay Street, Suite 4130
Houston, Texas 77002
(713) 757-0679

Attorney for Petitioner,
MANUEL JARAMILLO

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2716

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

MANUEL JARAMILLO,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CR-M-89-390)

(October 16, 1991)

Before WISDOM, JOLLY, and SMITH, Circuit Judges.
JERRY E. SMITH, Circuit Judge:[1]

A jury convicted Manuel Jaramillo of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A), conspiracy to possess marihuana with intent to distribute, in violation of *id.* §§ 846, 841(a)(1), and 841(b)(1)(C), and possession of marihuana with intent to distribute, in violation of *id.* §§ 841(a)(1) and 841(b)(1)(C) and

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1. Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

18 U.S.C. § 2. Jaramillo challenges his conviction on the ground that the evidence introduced at trial was insufficient to support the verdict. He also charges that the district court erred in overruling his motions to dismiss the charges against him for prosecutorial vindictiveness and prosecutorial misconduct. Finding no error, and viewing the evidence in the light most favorable to the verdict, we affirm.

I.

According to testimony in the record, in 1987 government informant Pablo Conde was introduced to Jose Luis Sepulveda. Sepulveda then introduced Conde to Jaramillo, telling Jaramillo that Conde could smuggle drugs around Border Patrol checkpoints in the United States. Jaramillo and Conde arranged for Conde to transport a 120-pound load of marihuana as a trial run.

On May 27, 1987, after a number of meetings at the apartment of Jaramillo's associate, Rodolpho Pena, Jaramillo met Conde at Sepulveda's house in Mission, Texas, with three boxes, placed them into Conde's pickup, and told him to contact Charley Howell in Corpus Christi, where the marihuana was supposed to be delivered. Jaramillo represented that the boxes contained 120 pounds of marihuana, and he cautioned Conde not to open the boxes.

The next day Jaramillo and Sepulveda met Conde in Corpus Christi and introduced him to Howell. The four men, with another, drove to a warehouse where Conde had arranged to store the boxes. Howell eventually told Conde that the boxes contained 120 pounds of marihuana sealed in black tape or plastic; Jaramillo told him that marihuana had been vacuum sealed, so that there would

be no worry over the odor. Jaramillo also told Conde not to open the boxes, which were coated with wax, apparently to ensure that any inspection would be noticed.

According to Conde, Pena later contacted him about transporting cocaine. At a meeting, Jaramillo told Conde that he wanted to buy cocaine to transport to his people in Chicago, so that they could make their living. Sepulveda told Conde to contact him after the cocaine sale. Jaramillo then met with Conde and Drug Enforcement Administration Special Agent Dennis Bryant, who was undercover, and took Bryant to his house to show him "good faith" money to demonstrate his ability to purchase a large amount of cocaine. Jaramillo was then arrested, and police searching his house found $350,000 in a suitcase, a money counting machine, a gun, and some cocaine.

II.

The procedural history of this case is complex and deserves attention. In essence, Jaramillo faced three sets of indictments: cocaine indictments in Brownsville, Texas; marihuana indictments in McAllen, Texas; and McAllen cocaine indictments. The Brownsville indictments were disposed of in a consensual government motion to dismiss without prejudice.

The original McAllen marihuana indictment charged Jaramillo, Howell, and Sepulveda with conspiracy to possess with intent to distribute more than fifty kilograms of marihuana. The superseding McAllen indictment charged those three and "Fernando LNU" ("last name unknown") with conspiracy to possess 121 pounds of marihuana and with aiding and abetting the possession of the marihuana.

The original McAllen cocaine indictment charged Jaramillo with attempting to possess with intent to distribute more than five kilograms of cocaine. A superseding indictment charged Jaramillo with that crime and with simple possession of cocaine. A trial on this indictment ended in a mistrial.

The grand jury subsequently issued a second superseding McAllen cocaine indictment. It charged the defendant in three counts: Count one charged Jaramillo, Sepulveda, and Pena with conspiring amongst themselves and with persons unknown to possess with intent to distribute more than five kilograms of cocaine; count two charged Jaramillo with aiding and abetting the possession of more than fourteen grams of cocaine; and count three charged Jaramillo with possessing a firearm during a drug crime.

On the government's motion, the court consolidated the superseding McAllen marihuana indictment and the second superseding McAllen cocaine indictment, presenting Jaramillo with five counts. The first trial on these counts ended in a mistrial. At a second trial, the jury acquitted Jaramillo of the firearm and simple cocaine possession charge but convicted him of marihuana conspiracy and possession and cocaine conspiracy. The jury found Pena not guilty, and Sepulveda, who had eluded capture, was not tried.

III.

A.

Jaramillo first argues that the evidence was insufficient to establish that he conspired to possess cocaine with intent to distribute. Agreement is an essential element of

the offense of conspiracy. *See United States v. Morgan,* 835 F.2d 79, 82 (5th Cir. 1986). Because Conde, as a government agent, could not be a party to an agreement, and Pena, who the government contended at trial was Jaramillo's co-conspirator, was acquitted, Jaramillo contends that the government did not produce evidence that he agreed with anyone to possess cocaine.

When presented with a claim that the evidence was insufficient to support a criminal conviction, we determine whether viewing the evidence in a light most favorable to the prosecution, a rational jury could have found the substanial elements of the conviction beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979); *United States v. Hopkins,* 916 F.2d 207, 212 (5th Cir. 1990). We conclude that the jury could have found that Jaramillo conspired with someone other than Pena.

The indictment under which Jaramillo was tried, and the jury instructions in his trial, stated that he was being charged with conspiring with Pena, Sepulveda, and other persons unknown. Under this indictment, the jury could convict Jaramillo, even if it found Pena not guilty, if it concluded beyond a reasonable doubt that Jaramillo had conspired with Sepulveda or someone else. The evidence in the record could support such a conclusion. Because we decide that the jury could have found that Jaramillo could have conspired with others, we need not consider whether, under *United States v. Powell,* 469 U.S. 57 (1984), he could be convicted of conspiring with Pena despite the latter's acquittal. *See United States v. Sheikh,* 654 F.2d 1057 (5th Cir. Unit A Sept. 1981), *cert. denied,* 454 U.S. 991 (1982).

First, the jury could have concluded that Jaramillo conspired with unidentified people in Chicago. Conde testified that in his discussions with Jaramillo to plan the cocaine smuggling, the defendant stated that "he needed to get narcotics to Chicago because that's the way his people made a living." Such testimony could well indicate that Jaramillo and "his people" had an existing business relationship and a shared intent to distribute the cocaine, thus distinguishing this case from *United States v. Villasenor*, 894 F.2d 1422 (5th Cir. 1990), in which we held that the mere quantity of drugs possessed was insufficient, alone, to establish the existence of co-conspirators. Additionally, Jaramillo's housekeeper acknowledged that Jaramillo travelled to Chicago on a number of occasions, ostensibly to visit a doctor but always in possession of a briefcase that a government agent later found to contain $350,000. The jury thus could conclude that Jaramillo conspired with "his people" in Chicago to obtain and distribute cocaine.

Second, the jury could have concluded that Sepulveda, who fled after Jaramillo's arrest, was the defendant's co-conspirator. Sepulveda was present at many of the meetings with Jaramillo that Conde attended; he even introduced the informant to Jaramillo. He participated in Jaramillo's marihuana plot, and obviously knew of the cocaine plot, because he asked Conde to call him when the cocaine had been delivered. Additionally, Conde testified that Jaramillo was to provide Sepulveda with a cut of the profits from all of the drug transactions that they conducted.

B.

Jaramillo secondly contests the sufficiency of the evidence to support his conviction for possession of mari-

huana. He argues that the government seized no marihuana, and the record reflects no laboratory analysis or expert or lay opinion to prove the identity of the alleged contraband. He argues that no one identified the purported substance and that the evidence equally supports an inference that the cardboard boxes were empty, part of Jaramillo's attempt to learn whether Conde was competent and trustworthy.

Despite the absence of the marihuana at trial, we find that the evidence was sufficient for the jury to conclude beyond a reasonable doubt that the boxes contained the illegal substance. As the defendant acknowledges, circumstantial evidence may establish the identity of a drug in a prosecution for violation of the narcotics laws. *United States v. Eakes*, 783 F.2d 499, 504 (5th Cir.), *cert. denied*, 477 U.S. 906 (1986). In this case, Jaramillo, Sepulveda, Pena, and Howell all described the contents of the boxes as marihuana, and Howell was arrested while attempting to sell it to an undercover officer. Conde testified that he was to be paid $60 per pound if the delivery was north of the checkpoint, and Jaramillo paid him at least $7,200, consistent with the price for a load of 120 pounds of marihuana. Agent Bryant testified that the sealing and packaging of the crates was consistent with an attempt to hide marihuana and explained the government's failure to open the boxes. Howell and his cohorts, in conducting countersurveillance prior too his arrest, further implied the illegality of the activity; if the boxes were empty, they would have had nothing to fear. Taken altogether, the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that the boxes contained marihuana.

C.

Lastly, Jaramillo charges that the district court erred in overruling his pleas of prosecutorial misconduct and vindictiveness. Jaramillo argues, in essence, that he has been subject to multiple jeopardy, because the government several times over a three year period brought and dismissed charges and has reprosecuted the defendant after two mistrials on substantially the same facts. Jaramillo argues that although double jeopardy does not generally arise in reprosecution following the declaration of a mistrial upon a defense request, in this case the government provoked him into requesting the mistrial, so that further prosecution should have been barred. *See Oregon v. Kennedy*, 456 U.S. 676 (1982).

The district court found that the government, in increasing the charges of the indictments, had not acted vindictively. It found that the first mistrial was not intentional; rather, the court found the elicting of prejudicial testimony from informant Conde to have been simply negligence. The court stated that the second prosecutor did not goad Jaramillo into moving for a mistrial.

Jaramillo offers no real evidence to refute the district court's finding. He presents nothing more than vague implications, suppositions, and conclusory claims to support his position that the government acted vindictively in increasing the charges against him and that it intentionally created the situations that necessitated the mistrials. We thus accept the district court's findings and AFFIRM.

APPENDIX B

SUPERSEDING INDICTMENT

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

CRIMINAL NO. M-89-390-S1

UNITED STATES OF AMERICA,
Plaintiff

v.

MANUEL JARAMILLO
JOSE LUIS SEPULVEDA
RODOLFO PENA
FERNANDO LNU
Defendants

(Filed January 23, 1990)

INDICTMENT

THE GRAND JURY CHARGES:

From on or about April 1, 1987, to on or about July 23, 1987, in the Southern District of Texas and within the jurisdiction of the Court, Defendants

MANUEL JARAMILLO
JOSE LUIS SEPULVEDA
RODOLFO PENA and
FERNANDO LNU

did knowingly and intentionally conspire and agree together with other persons known and unknown to the

Grand Jurors to knowingly and intentinally possess with intent to distribute more than 50 kilograms but less than 100 kilograms of marihuana, a Schedule I controlled substance.

[Violation: Title 21, United States Code, Sections 846, 841(a)(1) and 841(b)(1)(C)]

Count Two

On or about May 29, 1987, in the Southern District of Texas and within the jurisdiction of the Court, Defendants

MANUEL JARAMILLO
JOSE LUIS SEPULVEDA
RODOLFO PENA and
FERNANDO LNU

did knowingly and intentionally possess with intent to distribute more than 50 kilograms but less than 100 kilograms, that is, approximately 121 pounds of marihuana, a Schedule I controlled substance.
[Violation: Title 21, United States Code, Sections 841 (a)(1) and 841(b)(1)(C), and Title 18, United States Code, Section 2]

A TRUE BILL:

/s/ SHIRLEY HENSLEY
Foreman

HENRY K. ONCKEN
United States Attorney
/s/ (Signature Illegible)
Assistant United States Attorney

APPENDIX C

SUPERSEDING INDICTMENT

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

CRIMINAL NO. M-89-517-S2

UNITED STATES OF AMERICA,
Plaintiff

v.

MANUEL JARAMILLO
JOSE LUIS SEPULVEDA
RODOLFO PENA
Defendants

INDICTMENT

THE GRAND JURY CHARGES:

That from on or about April 1, 1987, to on or about July 23, 1987, within the Southern District of Texas, and elsewhere within the jurisdiction of this Court, Defendants

MANUEL JARAMILLO
JOSE LUIS SEPULVEDA
RODOLFO PENA

did knowingly and intentionally conspire and agree together with other persons unknown to the Grand Jurors to knowingly and intentionally possess with intent to distribute a quantity of cocaine in an amount in excess of 5 kilograms, a Schedule II controlled substance.

[Violation: Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A)]

Count Two

On or about July 22, 1987, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

MANUEL JARAMILLO

did knowingly and intentionally possess with intent to distribute less than 500 grams, that is, approximately 14 grams of cocaine, a Schedule II controlled substance. [Violation: Title 21, United States Code, Sections 841 (a)(1) and 841(b)(1)(C) and Title 18, United States Code, Section 2]

Count Three

On or about July 22, 1987, in the Southern District of Texas and within the jurisdiction of the Court, Defendant

MANUEL JARAMILLO

during and in relation to a drug trafficking crime, namely, the conspiracy to possess with the intent to distribute cocaine and the actual possession with the intent to distribute cocaine, did knowingly use or carry a firearm, namely a 45 caliber Colt pistol, serial number 5929-M2. [Violation: Title 18, United States Code, Section 924(c)].

A TRUE BILL:

_____

Foreman

HENRY K. ONCKEN
United States Attorney
/s/ (Signature Illegible)
Assistant United States Attorney